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Why Brownell Had to Crawl in The Lorwin Case

Behind the sensational collapse of the Lorwin perjury case in Federal District Court here last week was a month's desperate maneuvers by the Attorney General, first to save a leading Republican brain truster from being made to appear a malicious fool and perhaps a perjurer in public, and then to save himself from a possible citation for contempt. The extent of the desperation may be measured by the gravity of the steps taken to resolve the crisis.

The brain truster is Harold W. Metz, a product of Brookings Institution, the academic kept woman of American big business. The loyalty board testimony by Metz which Federal District Court Judge Curran ordered the Justice Department to produce would have done more than hurt Metz's reputation. The full revelation of Metz's political illiteracy would have damaged the Republican National Committee, for which Metz was research director from March, 1936 to May, 1942, and the Hoover Commission, on which he currently holds the same position.

The Lorwin indictment last December, coming as it did a month after Brownell's attack on Truman in the Harry White case, was intended to be an Eisenhower Administration showpiece, at once a means of appeasing McCarthy with a personal triumph and a demonstration that the Executive department could be trusted to clean house on its own. Val R. Lorwin, once a minor State Department official, was the first of those on McCarthy's famous list of "81 Communists" to be indicted, and his trial was in effect also to try and condemn the "old State Department" loyalty board officials who had appraised those charges and cleared Lorwin.

The Government Suddenly Balks

Lorwin was indicted for falsely denying that he had ever been a member of the Communist party, carried a party card and held a Communist party meeting in his home. The case began to collapse on May 7 when Federal District Judge Curran ordered the Justice Department to produce the transcript of the testimony Metz had given against Lorwin before the State Department loyalty board. Though the specific charges depended upon Metz and it would have been necessary to produce him in court to convict Lorwin, at this point the Justice Department suddenly balked. The government argued that production of the hitherto secret testimony would endanger internal security, breach its "confidential" classification, endanger sources of information, etc.

Unfortunately for the government these familiar pleas were impotent on this occasion. For one thing, the FBI did not consider Metz a "confidential informant." The FBI last April handed over the text of the statement made by Metz to it in July, 1950, during the investigation precipitated by the McCarthy charges and the loyalty inquiry. This statement had been produced in response to the usual pre-trial defense motion for examination of any statements by prosecution witnesses. It was at this point that for the first time Lorwin learned that his accuser was Metz, an old friend and one-time associate of his father, Lewis L. Lorwin. The defense then moved to subpoena Metz's loyalty board testimony under a recent Circuit court ruling (Fryer v. U.S. 207 F. 2d 135) which held that the defense is entitled (by Rule 17c) to all documentary evidence which may be used to impeach the witness.

Judge Curran ruled that no question of internal security was involved and that the alleged confidential character of the loyalty board proceedings had been waived when the government gave Lorwin a transcript of the proceedings minus Metz's testimony. Perhaps the Judge was also impressed by an affidavit from Benjamin C. O'Sullivan, Lorwin's counsel in the loyalty proceedings. O'Sullivan affirmed that the loyalty board, when asked to disclose the identity and testimony of the accusing witness at the time, saw no reason not to make this available if the witness were willing.

O'Sullivan said the board first "invited" Metz to appear and confront Lorwin. When Metz refused, it next asked him to permit his testimony to be made available to the defense. When Metz also objected to this, he was then asked by the board whether it might show Lorwin the testimony without disclosing Metz's name. This was also refused. Obviously this was not a case of a "confidential informant" (his name in that event would not have been disclosed to the loyalty board) but of a man who was afraid or ashamed to repeat in public the testimony he had given in private against an old friend, with whom he had once in 1935 shared a room.

A Well-Known Socialist Family

The loyalty board did not think much of Metz's testimony. The Lorwin-Strunsky clan to which Val Lorwin belongs is a well-known Socialist family. Among the 99 witnesses on his behalf was Norman Thomas. That such charges should ever have been brought against Val Lorwin attests the incredible ignorance and lack of elementary political sophistication among our inquisitors. One of the bits of evidence which particularly impressed the loyalty board was that Communists in 1935 did not have party "cards" but carried little 16-page booklets while Socialists at that time did have red "cards." This, plus a Socialist meeting and a remark made in jest, all remembered 15 years later by a man "hipped" on the question of Reds, may explain the accusation.

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Can Ex-Communists Ever Redeem Themselves?

The Long and Sinister Shadow Cast By The Galvan Decision

The case of Robert Norbert Galvan decided last Monday in the U.S. Supreme Court went so far in its invasion of civil liberties that it brought together in his defense the two extremes within the American Civil Liberties Union. Side by side on his brief were Osmond K. Fraenkel and Morris L. Ernst. Both are veteran directors of the ACLU but their sharp divergence of outlook is indicated by the former's activity as a leading spirit in the National Lawyers Guild, the latter's as personal counsel to J. Edgar Hoover.

Galvan v. Preis grew out of an order of deportation against a Mexican cannery worker in Southern California. It was the first test of the constitutionality of that provision of the Internal Security Act of 1950 ("the McCarran Act") which makes aliens deportable for past membership in the Communist party, without regard to why they joined, how they left or what their present opinions may be.

Galvan himself was so anxious to prove the sincerity of his break with the Communist party that he had offered to rejoin it as an informer for the government. If Galvan is deportable for past membership, then so are other past members now employed as informers for the FBI and as anti-Communist experts by other branches of the government. The Galvan decision is in this respect the reductio ad absurdum of the Red hunt.

How Are Ex-Communists to Be Treated?

Fraenkel and Ernst converged on the case from opposite directions. Mr. Fraenkel, an uncompromising libertarian, who regards civil liberty as indivisible, has long defended the rights of Communists. Mr. Ernst, who regards Communists as "conspirators" and therefore outside the orbit of the Bill of Rights, has set himself up as the champion of the ex-Communist, of his right to the three R's of rehabilitation, redemption and respectability. The Galvan case raised sharply, in the field of deportations, a question that must be resolved in other areas of public policy. How are ex-Communists to be treated?

The defense in the Galvan case argued the thesis put forward two years ago in the Ernst and Loth book, *Report on the American Communist*. "Absent a special juncture in Party affairs making dissimulation a likelihood," the brief urged, "it is much more probable than not that a resignation is bona fide."

Indeed, the brief continues, "the basic premise of our democracy, that truth will be accepted over error, indicates the likelihood that Communists will come to recognize their error." On the basis of FBI figures, the brief notes, most Communists do not stay in the party long enough for a real indoctrination: "among the approximately 700,000 past members of the Communist party in this country, the average length of membership was two or three years."

The Law's Inconsistency

One provision of the McCarran Act recognized the possibility of redemption by allowing aliens who have been members of the Communist party to become citizens if ten years or more have elapsed since they left the Party. Yet the provision tested in the Galvan case would make the same alien automatically deportable, though his membership may have ended 20 or 30 years before! "Indeed," the brief said, "as here interpreted, a past member would be deportable though his change of view had been manifested in his having 'actively opposed' the Communist ideology."

The law thus embodies that old joke about the Sheriff who slugged the man who claimed to be an anti-Communist. It doesn't care what kind of an ex-Communist the alien is. Pro or anti, he is equally deportable. This attitude is made plainer in two other cases recently decided by the Board of Immigration Appeals, *Mita v. Brownell* and *Gomez v. Brownell*. The Board held in Mita's case that proof of active hostility to Communism and present loyalty were irrelevant. The Board ordered Gomez deported as a past member though he had done no more than attend two meetings in 1937 and resigned because he felt that membership conflicted with his faith as a Catholic!

The Cruel Fiction of "Sending Him Home"

Like so many current deportees, Galvan came here as a child and spent most of his life in this country; he is "alien" by legal rather than common sense definition. He was six and a half when he emigrated from Mexico. He has lived here 36 years. He has an American wife, four American children and a stepson who was a paratrooper in the U.S. Army. It is a cruel fiction that deporting him to Mexico would be sending him back "to his own country."

In its details, as in its over all significance, the Galvan case is an affront to traditional standards of fair legal procedure. An uneducated cannery worker, Galvan joined the Communists in 1944 when they were still organized in the Communist Political Association. Then the program (according to the U.S. Supreme Court itself in the Dennis case) was "one of cooperation" with the government (341 U.S. 498) and therefore still lawful. He left, according to the government's finding, in 1946 shortly after the "line" had changed.

There was none of the usual evidence required to prove membership—an application, a card, payment of dues, adoption of a party name. Aside from one confused witness on whom the government itself did not rely in finding the duration of membership, the evidence was Galvan's own admission, given when first arrested in 1948. He was without counsel "and a perusal of the examination as a whole," the main defense brief argued, "clearly indicates he had been led to believe that acquiescence and docility, rather than an attempt at self-defense, was his best chance to avoid deportation."

Where Galvan's Fate Was Sealed

Poor Galvan's fate, it turned out, was sealed by the *Harisiades* case (342 U.S. 580). In that case the Supreme Court in March 1952 had to decide for the first time whether a man could be deported for *past* membership in an organization that advocates overthrow of the government by force and violence.

The Galvan case involved provisions which went a little further than this "extreme application" because the Internal Security Act makes past membership in the Communist party grounds for deportation and so eliminates the need to prove that the party advocates overthrow of the government by force and violence.

The facts in the Galvan case were also more extreme than in Harisiades. Galvan's lawyers argued that the latter involved persons whose membership may have been severed by

What The Dissenters Said in 1893

Mr. Justice Brewer: "It is said that the power here asserted [of deportation] is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? . . . The governments of other nations have elastic powers. Ours are fixed by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this constitution, was not destitute of examples and its framers were familiar with history, and wisely . . . gave to this government no inherent power to banish."

***—Fong Yue Ting v. U.S.* (149 U.S. 698).**

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the party itself for reasons of legal strategy while Galvan's case would determine the fate of ex-Communists who could demonstrate that they had broken with the party. The distinction was of no avail.

In Anything But Deportation

In any but a deportation case, a statute of this kind would be vulnerable on many grounds. It could be attacked as a bill of attainder, since by legislative act it finds a whole group guilty of a crime. It could be held a violation of due process, since no proof is required that the alien himself agrees with any unlawful purpose of the condemned group. It could be declared unconstitutional as ex post facto legislation, since membership in the Communist party was not unlawful at the time any of these people were members (and indeed is not unlawful per se today). It could be criticized as unreasonable, since its proclaimed objective is to break up a Communist "conspiracy" yet under its terms because he was once a Red a proven anti-Communist may be punished. It would be open to attack under the First Amendment since it punishes for associations and activities protected by that Amendment.

Mr. Justice Frankfurter held for the majority in the *Galvan* case last week as Mr. Justice Jackson held for the majority in the *Harisiades* case that a long line of precedents too firm to be shattered made none of these pleas applicable in the deportation of an alien. The law as they handed it down is substantially the law as it was once summed up in a famous Circuit Court decision, "There is no constitutional limit to the power of Congress to exclude or expel aliens." (16 F. 2d 423).

Deportation is a hideous anomaly. Aside from that, under the law as it stands an alien legally resident in this country has all the rights of a citizen except the right to vote or hold office. Neither his life nor his liberty nor his property may be taken without due process of law. Yet the severest punishment of all, in some cases worse than death itself, banishment from the country and separation from his family may be imposed without due process. The accepted doctrine is that deportation is not a punishment, that it is a civil rather than criminal proceeding, that the usual constitutional safeguards do not apply (though they do to other civil actions), that it is a "political" matter outside the jurisdiction of the courts.

Mr. Justice Murphy attacked this whole web of ideas in the Bridges case (326 U.S. 135). Justices Black and Douglas protested it in their dissents in both *Harisiades* and *Galvan*. Only two years ago Mr. Justice Jackson (with Mr. Justice Frankfurter concurring) noted uneasily (343 U.S. 169) that this doctrine of the special character of deportation "has been adhered to with increasing logical difficulty."

Both Jackson and Frankfurter washed their hands of blame. "Judicially," the former said in *Harisiades*, "we must tolerate what personally we may regard as a legislative mistake." "One merely recognizes," the latter said last week in *Galvan*, "that the place to resist unwise or cruel legislation touching aliens is the Congress, not the Court."

These wistful expressions do not flow inescapably from the nature of the law. The unwary reader would gather that the precedents which deny aliens full constitutional protection in deportation cases go back to some legal Sinai none may question.

Little Older Than Plessy v. Ferguson

But the precedent which dictated the deportation of the poor Mexican laborer Galvan is only two years older than the precedent the Supreme Court overturned the preceding Monday when it ruled against segregation in the schools. If *Plessy v. Ferguson* was not too hoary to be reversed, neither is *Fong Yue Ting v. U.S.* (149 U.S. 698). The latter was handed down in 1893, also by a split Court, with Chief Justice Fuller and Justices Field and Brewer dissenting. It was not until then, just sixty years ago, that a bitterly divided court ruled for the first time that deportation was not a criminal punishment and therefore not fully protected by the due process and ex post facto clauses. That hardly makes the doctrine coeval with the laws of Moses or of Manu.

If the reversal of the old Jim Crow ruling can hark back to those affirmations of human equality made at the foundation of the Republic, a reversal of the old deportation rule can invoke no less venerable authority. The three dissenters in 1893 were able to quote the Father of the Constitution himself against the doctrine being laid down by the majority. For James Madison, in his Report on the Virginia Resolutions against the Alien and Sedition Laws, said "it can never be admitted that the removal of aliens . . . is to be considered, not as punishment for an offense, but as a measure of precaution and prevention." (4 Elliott's Debates 555).

Majority opinion on the Court now accepts the principle that Congress may order whole groups of persons deported for racial, political or other reasons. The government's argument in the Galvan case is as sinister as it is complacent.

"The power of Congress to name the Communist Party specifically is also supported," the government brief argued (p. 11), "by the history of the country's expulsion legislation which contains some famous precedents for group designation without regard to individual worthiness. The Chinese deportation laws are the prime illustration. The Alien Enemy Act of 1798, on which Congress drew by way of analogy, is another, as is the anarchist deportation statute."

The terrible words are "expulsion . . . without regard to individual worthiness." This is not justice as we have thought of it in the past. If a poor alien like Galvan may be separated from his wife and children and country for past membership in the Communist party, may not citizens some day find themselves divested of citizenship and deported in the same way without regard to "individual worthiness," guilt or innocence, Communism or anti-Communism?

The Fatal Progression

Closely linked with deportation is denaturalization, which makes aliens of citizens. Eisenhower has asked Congress for legislation to deprive Communist "conspirators" of their citizenship, whether acquired by naturalization or birth. The idea is being sedulously propagated, often by people who will be themselves victims of it, that all Communists are conspirators.

If conspirators, will they not pretend to be other than they are? Can ex-Communists, though anti-Communists, escape the widening repercussions? Will not some argue, as McCarthy did in Wechsler's case, that the anti-Communism is only assumed? If the safety of the state rather than justice to the individual is to be the norm, will not the doubts be resolved against the individual?

If the foreign born can be made to see the menace of that old 1893 decision, it can be reversed by their political pressure as *Plessy v. Ferguson* was reversed by the political pressure and growing political awareness of the Negro. Events have shown that the fundamental rights of alien and citizen, naturalized and native born, are so closely intertwined that what impairs the liberty of one eats away the liberty of all.

What Black and Douglas Said

Mr. Justice Douglas dissenting: "As Mr. Justice Black states in his dissent, the only charge against this alien is an act that was lawful when done . . . I cannot agree that because a man was once a Communist he always must carry the curse . . . Galvan is not being punished for what he presently is, nor for an unlawful act, nor for espionage or conspiracy or intrigue against this country. He is being punished for what he once was, for a political faith he briefly expressed over six years ago and then rejected."

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Epilogue: Though the Innocent May Sometimes Go Free

The Guilty Continue to Sit In The Seats of Power

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In a competently run Department of Justice someone would have reviewed all this carefully before obtaining an indictment. When in response to Judge Curran's order the record was reviewed, it was realized how poor a case the government had and what a fool Metz would appear. But by that time, after two delays, the Attorney General was faced with the possibility of a contempt citation if he failed to obey the order to produce. To drop the case rather than obey the order would have been unseemly, perhaps risky. The dilemma was resolved by the discovery that the prosecutor, William Gallagher, had obtained the indictment by misrepresenting the facts to the grand jury (1) by claiming that two FBI informants were ready to identify Lorwin as a Communist and (2) that there was no point in questioning Lorwin (as the grand jury desired to do) because he would plead the Fifth. Both were untrue and the latter was idiotic, since if Lorwin had pleaded the Fifth there would have been no way to indict him for perjury or false statement. Gallagher was thereupon suspended and made the "goat" and on the basis of these new revelations the government was allowed to drop the indictment without producing Metz's testimony.

The honorable course would have been to obey the court order, and to make a statement clearly saying that there had been no basis for indicting Lorwin. But this would have made a liar of Metz, and disclosed the kind of intellectual who had been chief researcher for the G.O.P. in the 1936 and 1940 campaigns against Roosevelt, and who was now fulfilling the same function for a Commission empowered by law "to study and investigate organization and methods of operation for the executive branch of the Government." This time the egghead was a Republican, and the egg smelled bad.

What Wayne Morse Said of Metz's Work

Metz through the Hoover Commission will continue to occupy an influential place in the inner councils of the government while Lorwin goes back to his teaching position in the University of Chicago with his name still not completely cleared. The Metz testimony recalls the controversy stirred in 1947 when Senator Wayne Morse in the May-June, 1947, issue of *Labor and Nation*, attacked a Brookings study by Metz and Meyer Jacobstein, called "A National Labor Policy."

The review was headed "Brookings Institution Fixes Facts to Anti-Union Ends" and in it Senator Morse said, "This volume is full of inaccuracy and distortion. It piles innuendo upon half-truth. It is superficial and misleading and inaccurate." His view was supported in the American Economic Review, organ of the American Economic Association. In the June, 1947, issue Herbert R. Northrup said of this book and Metz's previous Brookings Institution study on labor policy published two years earlier, that the two "taken together, are replete with errors and with misstatements of fact and policy, which are in turn derived from questionable sources and biased or unwarranted interpretations." The bias was indicated by Northrup's observation about the 1947 book that its recommendations "present a curious anomaly. On the one hand, the authors would reduce unions to local organizations. On the other, they would subject them to enormous federal control." This is, of course, the kind of scholarship now in favor here.

Metz has been saved from the spotlight, while people like Lorwin, despite clearance, are pushed out of the government. Like many others who have been cleared, he resigned on reinstatement because the ordeal and the state of mind it revealed made staying in public service too unpleasant. It will be interesting to see when and whether Gallagher's suspension will be lifted; his past conduct in this and similar cases makes the government's revelations about this action before the grand jury no surprise. Brownell, having run away, will live to smear another day—perhaps picking his next victim more circumspectly. As for Low Blow Joe, his crimes are so many, who will bother to recall this ignominious collapse of the government's case against the only one of his "81"? Such is the dirty smog that hangs over our national capital in 1954. The innocent may still sometimes obtain justice, but the guilty continue to sit in the seats of power.

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